Messrs K Sila Dass & Partners v Tune Insurance Malaysia Bhd (formerly known as Oriental Capital Assurance Bhd) & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC(ARB)-11–04 OF 2016
MOHD NAZLAN JC
24 NOVEMBER 2016

Arbitration — Award — Question of law — Plaintiff referred to court under s 42 of the Arbitration Act 2005 to set aside arbitral award — Whether arbitrator bound by determination made by High Court — Determination of a question of law that must be followed in reconsideration of award — Arbitration Act 2005 s 42

The plaintiff was a law firm partnership whereas the defendants were licensed insurer that participated in the Malaysian Bar Professional Indemnity Insurance Scheme ('the scheme'), providing mandatory professional indemnity insurance coverage to legal practitioners against civil liability arising out of the conduct of their legal practice. The plaintiff had notified the defendants of 15 civil liabilities arising out of 15 claims. In response, the defendants deemed the 15 claims as 'one claim' under cl 36(k)(ii) of the Certificate of Insurance ('the COI') and subsequently the defendants settled one claim and repudiated the remaining 14 claims. Aggrieved, the plaintiff referred the matter to the arbitration. The arbitrator found in favour of the plaintiff and decided that the repudiation was unlawful ('the first award'). The defendants then referred to the High Court ('the OS 26') on question of law pursuant to s 42 of the Arbitration Act 2005 ('the Act') and the High Court found in favour of the defendants ('the High Court order'). The plaintiff's appeal to the Court of Appeal was allowed and the Court of Appeal set aside the decision of the High Court and remitted the matter back to arbitration for reconsideration ('the Court of Appeal order'). The arbitrator in his decision ruled that the repudiation of the 14 claims was rightfully made ('the fresh award'). Despite his conclusions, the arbitrator disagreed with the question of law determined by the High Court but took the position that he was legally bound by the decision in his reconsideration of the first award. The plaintiff filed the present action to set aside the fresh award based on three proposed questions of law which were: (a) whether the High Court's answer in the OS 26 was binding on the arbitrator when reconsidering the first award under the remission order made by the Court of Appeal ('the first question'); (b) whether the High Court had correctly construed the definition of 'one claim' under cl 36(k) of the COI 2006 ('the second question'); and (c) whether the fresh award was tenable in view of the other findings made by the arbitrator on the construction of the definition of 'one claim' under cl 36(k) of the COI 2006 ('the third question').

The relevant issues considered by the court in the present action were whether an arbitrator was under the law bound by the determination made by the High Court; whether the arbitrator in the present case was bound by the determination by the High Court in OS 26; and what was the determination of a question of law that must be followed in the reconsideration of the first award.

Held, remitting the fresh award for a fresh reconsideration under s 42(4)(c) of the Act with the question of law determined by the High Court order, as reversed by the Court of Appeal order:

(1) It was entirely an unsustainable argument to maintain, as what the plaintiff in effect tried to do, that an arbitrator could decide not to follow the determination on the question of law by the High Court in answer to a question of law referred to it. This would be a flagrant repudiation of the legislative scheme of s 42 of the Act which stipulated that a question of law arising from an arbitral award was to be answered by the High Court. As such, an arbitral tribunal must rightly be bound by the determination made by the High Court under s 42(4)(c) of the Act (see paras 41 & 53).

(2) In the present case, the learned arbitrator was not bound to follow the High Court order because the said order had been set aside by the Court of Appeal, and not because, as argued by the plaintiff, of any legal principle that a determination on a question of law was not binding on an arbitrator following a remission order under s 42 of the Act. The fresh award was thus inflicted by an error of law on the face of the award (see paras 66 & 68).

(3) In the event appellate intervention on the question of law determined by the High Court resulted in the situation such as presently encountered by the parties, the reference in the legislative scheme of s 42(4)(c) of the Act to the High Court as the court making the determination on the question of law and as the court making the remission of the award back to the arbitral tribunal must necessarily be construed to mean and refer to the Court of Appeal. Since the Court of Appeal made the remission, the Court of Appeal must also be construed to had made the determination on the question of law to accompany the remission. The learned arbitrator should have therefore applied the determination of the question of law as reversed by the Court of Appeal in arriving at the fresh award (see para 75).

(4) The first question of law was a proper and valid question of law arising out of the fresh award. In respect of this question of law, in consideration of the authorities on the point of patent injustice, the facts of the present case, which include probably a novel question on the binding status of the determination by the High Court on a question of law referred to it, but which was then subsequently set aside and reversed by the Court of

Appeal, more than amply demonstrated the quality of being tantamount to exceptional circumstances to justify intervention to prevent gross injustice to the parties to the proceedings (see paras 78 & 84).

(5) The second and third questions of law were not exactly questions of law and had in any event been determined by the High Court in OS 26, and subsequently by the Court of Appeal in setting it aside. These proposed questions of law could not be validly said to be arising from the fresh award and both questions were unnecessary since it would involve a re-examination of the issues already determined (see paras 80 & 86).

[Bahasa Malaysia summary

Plaintif merupakan perkongsian firma guaman di mana defendan-defendan adalah syarikat insurans berlesen yang menyertai Skim Insurans Perlindungan Profesional Peguam Malaysia ('skim tersebut'), yang memberikan perlindungan insurans indemniti profesional mandatori kepada pengamal-pengamal perundangan daripada liabiliti sivil yang timbul daripada menjalankan amalan perundangan mereka. Plaintif telah memberitahu defendan-defendan tentang 15 libiliti sivil yang timbul daripada 15 tuntutan. Sebagai jawapan, defendan-defendan menganggap 15 tuntutan itu sebagai 'one claim' di bawah fasal 36(k)(ii) Sijil Insurans ('SI') dan akhirnya defendan-defendan menyelesaikan satu tuntutan dan menolak baki 14 tuntutan itu. Terkilan, plaintif merujuk perkara itu kepada timbang tara. Penimbang tara mendapati telah menyebelahi plaintif dan memutuskan bahawa penolakan itu adalah menyalahi undang-undang ('award pertama'). Defendan-defendan kemudian merujuk kepada Mahkamah Tinggi ('OS 26') berhubung persoalan undang-undang menurut 42 Akta Timbang Tara 2005 ('Akta tersebut') dan Mahkamah Tinggi mendapati telah menyebelahi defendan-defendan ('perintah Mahkamah Tinggi'). Rayuan plaintif kepada Mahkamah Rayuan telah dibenarkan dan Mahkamah Rayuan telah mengetepikan keputusan Mahkamah Tinggi dan meremitkan semula perkara itu kepada penimbang tara untuk pertimbangan semula ('perintah Mahkamah Rayuan'). Penimbang tara dalam keputusannya telah memutuskan bahawa penolakan 14 tuntutan tersebut telah dibuat dengan wajar ('award baru'). Walaupun kesimpulannya sedemikian, penimbang tara tidak bersetuju dengan persoalan undang-undang yang ditentukan oleh Mahkamah Tinggi tetapi mengambil kedudukan bahawa beliau terikat secara sah dengan keputusan dalam pertimbangan semulanya berhubung award pertama. Plaintif telah memfailkan tindakan ini untuk mengetepikan award baru berdasarkan cadangan tiga persoalan undang-undang iaitu: (a) sama ada jawapan Mahkamah Tinggi dalam OS 26 adalah terikat ke atas penimbang tara apabila mempertimbangkan semula award pertama di bawah perintah remitan yang dibuat oleh Mahkamah Rayuan ('persoalan pertama'); (b) sama ada Mahkamah Tinggi telah mentafsirkan dengan betul definisi 'one claim' di bawah fasal 36(k) SI 2006 ('persoalan kedua'); dan (c) sama ada award baru itu

A boleh dipertahankan berdasarkan dapatan lain yang dibuat oleh penimbang tara berhubung pentafsiran definisi 'one claim' di bawah fasal 36(k) SI 2006 ('persoalan ketiga'). Isu-isu relevan yang dipertimbangkan oleh mahkamah dalam tindakan ini adalah sama ada penimbang tara yang di bawah undang-undang terikat dengan penentuan yang dibuat oleh Makamah Tinggi; B sama ada penimbang tara dalam kes ini terikat dengan penentuan oleh Mahkamah Tinggi dalam OS 26; dan apakah penentuan berhubung persoalan undang-undang yang perlu diikut dalam mempertimbangkan semula award pertama.

C **Diputuskan**, meremitkan award baru untuk pertimbangan semula baru di bawah s 42(4)(c) Akta tersebut dengan persoalan undang-undang ditentukan oleh perintah Mahkamah Tinggi, sepertimana diakas oleh perintah Mahkamah Rayuan:

D (1) Ia adalah sepenuhnya hujah mapan yang tidak boleh dikekalkan, kerana apa yang plaintif dengan berkesan cuba lakukan, agar penimbang tara boleh memutuskan untuk tidak mengikut penentuan berhubugn persoalan undang-undang oleh Mahkamah Tinggi dalam menjawab persoalan undang-undang yang dirujuk kepadanya. Ia adalah penolakan E yang tegas berhubung skim perundangan s 42 Akta tersebut yang menetapkan bahawa persoalan undang-undang yang timbul daripada award timbang tara perlu di jawab oleh Mahkamah Tinggi. Oleh itu, tribunal timbang tara mesti terikat dengan sewajarnya oleh penentuan yang dibuat oleh Mahkamah Tinggi di bawah s 42(4)(c) Akta tersebut F (lihat perenggan 41 & 53).

(2) Dalam kes ini, penimbang tara yang bijaksana tidak terikat untuk mengikut perintah Mahkamah Tinggi kerana perintah tersebut telah diketepikan oleh Mahkamah Rayuan, dan bukan kerana, seperti yang G dihujah oleh plaintif, oleh mana-mana prinsip perundangan bahawa penentuan berhubung persoalan undang-undang adalah tidak terikat ke atas penimbang tara berikutan perintah remitan di bawah s 42 Akta tersebut. Award baru tersebut oleh itu buat akibat kesilapan undang-undang atas muka award itu (lihat perenggan 66 & 68).

H (3) Dalam keadaan di mana campur tangan rayuan berhubung persoalan undang-undang ditentukan oleh Mahkamah Tinggi mengakibatkan situasi sepertimana yang dialami oleh pihak-pihak, rujukan dalam skim perundangan s 42(4)(c) Akta tersebut kepada Mahkamah Tinggi kerana mahkamah yang membuat penentuan berhubung persoalan I undang-undang dan kerana mahkamah yang membuat peremitan award kembali kepada tribunal timbang tara hendaklah perlu ditafsirkan untuk bermaksud dan merujuk kepada Mahkamah Rayuan. Oleh kerana Mahkamah Rayuan telah membuat peremitan, Mahkamah Rayuan juga hendaklah ditafsirkan sebagai telah membuat penentuan berhubung

persoalan undang-undang untuk mengiringi peremitan itu. Penimbang tara yang bijaksana sepatutnya telah mengguna pakai penentuan berhubung persoalan undang-undang seperti yang diakas oleh Mahkamah Rayuan untuk tiba kepada award baru tersebut (lihat perenggan 75).

(4) Persoalan undang-undang pertama adalah persoalan undang-undang yang wajar dan sah yang timbul daripada award yang baru. Berhubung persoalan undang-undang ini, dalam mempertimbangkan autoriti-autoriti berkaitan ketidakadilan paten, fakta kes ini, yang mungkin termasuk soalan baru tentang status mengikat mengenai penentuan oleh Mahkamah Tinggi berhubung persoalan undang-undang yang dirujuk kepadanya, tetapi yang kemudian telah diketepikan dan diakas oleh Mahkamah Rayuan, lebih jelas menunjukkan kualiti yang menjadi sama seperti keadaan yang dikecualikan bagi mewajarkan campur tangan untuk menghalang ketidakadilan melampau berlaku terhadap pihak-pihak kepada prosiding (lihat perenggan 78 & 84).

(5) Persoalan undang-undang kedua dan ketiga bukan persoalan undang-undang sebenar dan dalam apa keadaan telah ditentukan oleh Mahkamah Tinggi dalam OS 26, dan kemudian oleh Mahkamah Rayuan untuk mengetepikannya. Persoalan-persoalan undang-undang yang dicadangkan tidak boleh secara sah dikatakan telah timbul daripada award baru dan kedua-dua persoalan adalah tidak perlu kerana ia melibatkan pemeriksaan semula isu-isu yang telahpun ditentukan (lihat perenggan 80 & 86).]

Notes

For cases on question of law, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1967–1972.

Cases referred to

Ajwa For Food Industries Co (Migop), Egypt v Pacific Inter-Link Sdn Bhd & another appeal [2011] MLJU 1537; [2013] 2 CLJ 395, CA (refd)

Awangku Dewa bin Pgn Momin & Ors v Superintendent of Lands and Surveys, Limbang Division [2015] 3 MLJ 161, CA (refd)

Far East Holdings Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang and another appeal [2015] 4 MLJ 766; [2015] 8 CLJ 58, CA (refd)

Farm Credit Canada v National Bank of Canada [2011] SJ No 676, CA (refd)

Interbulk Ltd v Aiden Shipping Co Ltd, The Vimeira (No 1A) [1985] 2 Lloyd's Report 410, CA (refd)

Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd [2016] 2 MLJ 697; [2016] 3 CLJ 403; (2016) 2 MLRA 407, CA (refd)

SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd [2014] 2 MLJ 627, CA (refd)

A *Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217; [1993] 3 CLJ 210, SC (refd)

Legislation referred to

Arbitration Act 1996 [UK] ss 69(7)(c), 71(3)
B Arbitration Act 2001 [SG] s 49(8)(c)
Arbitration Act 2005 ss 42, 42(1), (1A), (2)(c), (4), (4)(a), (4)(b), (4)(c), (4)(d), (5), (6)
Rules of Court 2012 O 69 r 2(1)(h)

C *Prakash Lachimanan (Syed Ismit Putra with him) (Mathews Hun Lachimanan) for the plaintiff.*
Leong Wai Hong (Angela Yap with him) (Skrine) for the defendants.

Mohd Nazlan JC:

D INTRODUCTION

[1] This proceeding involves a reference made to this court under s 42 of the Arbitration Act 2005 to set aside an arbitral award.

E

[2] Following the conclusion of hearing, I remitted the award to the arbitrator under s 42(4)(c) of the Arbitration Act 2005 and highlighted the key reasons for my decision when delivering the same. This judgment contains the full reasons for my decision.

F KEY BACKGROUND FACTS

The parties

G **[3]** The plaintiff, Messrs K Sila Dass & Partners, is a law firm partnership, and having its main practice in Kluang, Johor with a branch office at Petaling Jaya, Selangor ('the PJ branch').

[4] Tune Insurance Malaysia Bhd and Pacific & Orient Insurance Co Bhd
H are the first and second defendants, respectively, both of which are licensed insurers that participated in the Malaysian Bar Professional Indemnity Insurance Scheme ('the PII scheme'), providing mandatory professional indemnity insurance coverage to legal practitioners against civil liability arising out of the conduct of their legal practice. For present purposes, it is sufficient to
I note that the first defendant was the insurer for the PII scheme for the years 2006 and 2007, whilst the second defendant was the insurer for the same for the subsequent years of 2008 and 2009.

The insurance policy

[5] By a contract of insurance contained in a master policy and certificate of insurance issued to the Malaysian Bar for and on behalf of its members, the defendants agreed to provide the plaintiff with the requisite professional indemnify insurance for the period of insurance stated in the policy. Specifically, the policy sought to indemnify the plaintiff against civil liability, including liability for costs, for a claim that arose from the plaintiff's legal practice and made during the period of insurance.

[6] The pertinent term embodied in the certificate of insurance ('the COI') that formed part of the PII scheme for the years 2006 and 2007 and which was the subject of much scrutiny in previous proceedings involving the parties hereto is as follows:

Clause 36(k)(i)–(iv)

One claim means:

(i) All claims by one or more claimants that arise from the same act or omission;

(ii) *All claims by one or more claimants that arise from one series of related acts or omissions or from the same or similar act or omission in a series of related matters or transactions*;

(iii) All claims by one or more claimants arising from one matter or transaction;

(iv) Otherwise each claim will be regarded as one claim.

[7] This term was however subsequently varied under the COI that was part of PII scheme for the years 2008 and 2009, highlighted as follows:

Clause 36(k)(i)–(iv)

One claim means:

(i) All claims by one or more claimants that arise from the same act or omission or from a series of related acts or omissions;

(ii) All claims by one or more claimants arising from one matter or transaction;

(iii) *All claims arising out of misconduct of one person acting alone or in collusion with others shall be regarded as attributable to one underlying cause and accordingly deemed to constitute one claim*;

(iv) Otherwise each claim will be regarded as one claim.

The repudiation of insurance claims

[8] The plaintiff had, in relation to the PII scheme, between the years 2006 and 2009, notified the defendants of 15 civil liabilities arising from 15 claims made against the plaintiff by various parties. Specifically, there was one claim in 2006, eight in 2007, four in 2008 and two in 2009.

[9] In 2010, the first defendant decided to settle the first claim notified by the plaintiff in 2006 which concerned a claim made by one Dr Mahendran a/l Rajaratnam ('Dr Mahendran') against the plaintiff. However, the defendants decided to repudiate liability under the PII scheme in respect of the remaining 14 claims.

[10] It was clarified by Jardine Lloyd Thompson Sdn Bhd ('JLT'), as the agent of the second defendant in its letter dated 2 April 2010 written behalf of the defendants to the plaintiff, that the remaining 14 claims had been treated as one claim with the claim involving Dr Mahendran. This was in view of the finding that all the fraud was perpetuated by the same employee of the plaintiff by the name of one Mr Manoharan. As such, cl 36(k)(ii) of the COI for 2006 was triggered to apply and thus deemed all of the 15 claims to be 'one claim'.

[11] Furthermore, in light of the fact that the first defendant had already indemnified the plaintiff for the sum of RM550,000 in relation to the first claim made by Dr Mahendran, the plaintiff's PII scheme mandatory coverage limit had been exhausted and there was no longer any available limit for the defendants to indemnify the plaintiff for the remaining 14 claims. Hence their repudiation.

The reference to arbitration

[12] The plaintiff disputes this stance of the defendants. Pursuant to cl 25 of the certificate of insurance, the plaintiff referred the dispute to arbitration. The plaintiff challenged the repudiation, principally contending that the claim by each party should be treated as one claim for the definition of one claim in cl 36(k) of the PII scheme for year 2006 did not treat all claims arising from the actions, omissions or misconduct of a single person or principal perpetrator whether or not in collusion with another as one claim. The additional meaning to one claim was in any event only included in the PII scheme for year 2008. It was also asserted that whilst Mr Manoharan was the prime suspect in the embezzlement, in all likelihood more than one person would have been involved in perpetrating the fraud on the plaintiff.

[13] On 8 April 2014, the learned arbitrator delivered the award which found in favour of the plaintiff ('the first award'). The repudiation of liability to indemnify the plaintiff in respect of all the 14 claims was determined to have been wrongful, and that the first defendant was thus found liable for each of the

claims notified in years 2006 and 2007 (apart from claim by Dr Mahendran), being claims No 2–9 in Annexure B of the points of claim with each claim being separately treated as one save for claim Nos 3 and 6 which are treated as one claim.

[14] The first award also found that the remaining six claims notified in years 2008 and 2009, being claims Nos 10–15 in Annexure B of the points of claim, should be treated as one claim. The second defendant was thus liable for the same accordingly.

The first reference to the High Court

[15] The defendants dispute these findings of the first award. The defendants then filed an originating summons to the High Court on 23 May 2014 to refer a question of law arising out of the fresh award in pursuance of s 42 of the Arbitration Act 2005 ('the AA'). Specifically, the defendants contended that the learned arbitrator had wrongly answered the question of law posed by himself in the negative. The question of law is as follows:

> Hence in the present Clause 36(k)(ii) of Certificate of Insurance 2006 where it does not provide for any further consideration of the underlying cause and instead limits itself to the words 'acts' themselves, can its construction be widened to include the underlying cause or source such as the same perpetrator or other commonalities which are underlying the fraud or embezzlement acts themselves? Can this widening be by implication or by use of the words 'related' before the word 'acts'?

[16] On 31 March 2015, the High Court allowed the defendants' application vide Originating Summons No 24NCC(ARB)-26–05 of 2014 pursuant to s 42 of the AA ('the High Court order' or 'OS 26') and ruled that the said question of law should instead be answered in the positive. The pertinent parts of the High Court order are as follows:

> (1) that pursuant to Section 42(1) of the Arbitration Act 2005, the question of law posed by the Learned Arbitrator at paragraph 89 of the Partial Award (On Liability) made and published by the Learned Arbitrator, Belden Premaraj on 8 April 2014 and received by the parties on 14 April 2014, namely:
>
> > Hence in the present Clause 36(k)(ii) of Certificate of Insurance 2006 where it does not provide for any further consideration of the underlying cause and instead limits itself total words 'acts' themselves, can its construction be widened to include the underlying cause or source such as the same perpetrator or other commonalities which are underlying the fraud or embezzlement acts themselves? Can this widening be by implication or by use of the words 'related' before the words 'acts'?
>
> Be determined as follows:
>
> > The word 'related acts' in 'all claims by one or more claimants that arise from one series of related acts ...' in clause 36(k)(ii) of Certificate of Insurance 2006 should

A be interpreted to include the acts, all fraudulent in nature, by the same perpetrator carried out at one locality namely the defendant's Petaling Jaya Office when the said perpetrator was the defendant's chief clerk of the Petaling Jaya Office.

B (2) that the Partial Award (On Liability) made and published by the Learned Arbitrator, Belden Premaraj on 8 April 2014 and received by the parties on 14 April 2014 be set aside on the ground that there was an error of law on the face of the award ...

C **[17]** The High Court delivered its grounds of the decision dated 27 May 2015 in respect of its order dated 31 March 2015 allowing the application by the defendants. It is imperative to note that the challenge by the plaintiff and by the parties in subsequent proceedings is concerned only with the finding of liability made in the first award. The use of the expression 'partial award' in such proceedings is for clarity thus a reference to the entire issue of liability only.

D

Appeal to the Court of Appeal

E **[18]** Dissatisfied with the decision of the High Court, the plaintiff pursued an appeal to the Court of Appeal vide Civil Appeal No W-02 (NCC)(A)-575–04 of 2015.

F **[19]** On 25 November 2015, the Court of Appeal gave its judgment for the plaintiff and specifically made the following orders ('the Court of Appeal order'):

(a) appeal is allowed with costs of RM15,000;

(b) the order of the High Court dated 31 March 2015 setting aside the partial award with costs of RM20,000 is set aside; and

G

(c) this case is to be remitted to the arbitral tribunal for reconsideration pursuant to s 42(4)(c) of the Arbitration Act 2005.

Reconsideration by arbitrator — the fresh award

H

[20] In accordance with the clear terms of the said Court of Appeal order of 25 November 2015, the first award was thus remitted to the learned arbitrator for his reconsideration under s 42(4)(c) of the AA.

I **[21]** On 4 March 2016, the learned arbitrator delivered his decision pursuant to the remission order from the Court of Appeal, which determined that the defendants had rightfully repudiated liability in respect of the 14 claims ('the fresh award'). In this fresh award, however, it is manifest that despite his conclusions made therein, the learned arbitrator had disagreed with

the determination of the question of law made in the High Court order of 31 March 2015, but took the position that he was legally bound to accept the same in his reconsideration of the first award which thus resulted in the fresh award.

[22] This stance of the learned arbitrator is apparent from a review of the fresh award, where in reaching his conclusions, he had made, among others, the following findings and observations:

> iv. [8] Hence there is no doubt in my mind that I am required to reconsider my previous award based on the High Court's Decision of the question of law which in this case is the High Court's interpretation of Clause 36(k)(ii) of the Certificate of Insurance 2006. This is regardless of whether I consider the High Court's Decision misconceived or plainly wrong. The principle of stare decisis even apply to an Arbitral Tribunal when determining issues of law. In this case it goes beyond stare decisis since the High Court's decision is on this very same matter that is before me on remission and it includes the interpretation of the very same clause that I am to interpret namely clause 36(k)(ii) of the Certificate of Insurance 2006.
>
> ...
>
> vii. [109] Although in my view the High Court clearly did not appreciate the decision of Lord Hoffman in *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co. Ltd* [2003] UKHL 48, I am constrained to follow the High Court Decision. It also stands currently as the only decision in Malaysia that interprets what is 'related acts' for a series of frauds or embezzlements and I am bound to follow a Malaysian decision rather than an English decision, however sound that English decision may be since Malaysian law is the applicable law in the case. Even more so I am required by the Order of the Court of Appeal to give regard to the High Court Decision.
>
> ...
>
> xvii. Conclusion on Award
>
> I AWARD And ORDER or DIRECT or DECLARE that:
>
> (a) the Respondents' repudiation of liability or refusal to indemnify
>
> (b) the Claimant for all the said 14 claims is rightful;
>
> (c) the first Respondent is liable only for the first claim by Dr Mahendran Rajaratnam.

The second reference to the High Court — the instant proceeding

[23] The plaintiff, dissatisfied with the fresh award, filed this originating summons dated 13 April 2016, seeking the setting aside of the fresh award by making the reference to this court of three proposed questions of law within the meaning of O 69 r 2(1)(h) of the Rules of Court 2012 for relief under s 42 of the AA, in particular as follows:

1. whether in reconsidering the Partial Award (On Liability) made and

published by Belden Premaraj, the arbitrator on 8 April 2014 pursuant to the Order of the Court dated 25 November 2015 in Civil Appeal No W-02 (NCC)(A)-575-04/2015 and in accordance with Section 42(4)(c) of the Arbitration Act 2005, the arbitrator is bound by and constrained to follow the Judgment ('the Decision') of the High Court dated 27 May 2015 in respect of the Order dated 31 March 2015 delivered by the High Court of Malaya at Kuala Lumpur in Originating Summons No 24NCC-(ARB)-26-05/2014;

2. further to the question at paragraph 1 above, if the arbitrator is bound by and constrained to follow the Decision of the High Court, whether the High Court in its Decision had correctly construed and/or interpreted the meaning or definition of 'One Claim' in Clause 36(k) of the Certificate of Insurance 2006 under the Malaysian Bar Professional Indemnity Insurance;

3. further to the question at paragraph 1 above, if the arbitrator is not bound by and constrained to follow the Decision of the High Court, whether the Award made and published by the arbitrator on 4 March 2016 ('the fresh award') is tenable in view of other findings and observations made by the arbitrator in the fresh award and also in the first award with regards to the construction and/or interpretation of the meaning or definition of 'One Claim' in Clause 36 (K) of the Certificate of Insurance 2006 under the Malaysian Bar Professional Indemnity Insurance found at paragraphs 66 to 107 of the first award;

4. consequent to the questions at paragraphs 1 to 3 above, an order that the fresh award be set aside;

5. further and/or alternatively the fresh award is set aside on the ground that there is an error of law on the face of the award;

6. consequent to order setting aside the fresh award at paragraph 4 and/or 5 above, the following relief:

i. declaration that the defendants' repudiation of liability or refusal to indemnify the plaintiff for all the remainder 14 claim under the Malaysian Professional Indemnity Insurance Scheme as referred in the Amended Points of Claim in the Arbitration Proceedings before the arbitrator is wrongful;

ii. a declaration that the first defendant shall be liable for each of the claims notified in the years 2006 and 2007 (apart from the first claim by Dr Mahendran Rajaratnam) namely claims No 2 to 9 in Annexure B of the Amended Points of Claim pursuant to Certificate of Insurance 2006 and 2007 with each individual claim being separately treated as one claim apart from claim No 3 and 6 which are treated as one claim;

iii. a declaration that the remaining 6 claims being Claims No 10 to 15 in Annexure B of the Amended Points of Claim are treated as One Claim pursuant to Certificate of Insurance 2008 and 2009 and the second defendant shall be liable accordingly for the same.

7. That costs of and incidental to this proceeding to be borne by the defendants; and

8. Further relief and directions that this Honourable Court deems fit and proper.

THE LAW

[24] This reference, as was the one which resulted in the High Court order of 31 March 2015 in OS 26 and the appeal to the Court of Appeal is made pursuant to s 42 of the AA, the relevant parts of which for present purposes provide as follows:

Section 42 Reference on questions of law

(1) Any party may refer to the High Court any question of law arising out of an award.

...

(4) The High Court may, on the determination of a reference —

(a) confirm the award;

(b) vary the award;

(c) remit the award in whole or in part, together with the High Court's determination on the question of law to the arbitral tribunal for reconsideration; or

(d) set aside the award, in whole or in part.

[25] In my evaluation of this application, I will have regard to among others, the authority of *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697; (2016) 2 MLRA 407, where the Court of Appeal, principally in the judgment of Hamid Sultan Abu Backer JCA elaborated on the test in making reference under s 42 of the AA, the relevant parts of which read as follows:

[22] The first step is to consider the provision of s 42(8) which relates to security. That was not done in this case. Though I take note on the facts of the case and financial strength of the parties, it was not necessary.

[23] The second step is for the court to ask the hypothetical question, taking the complaint of the applicant at its highest whether the purported question of law raised, will substantially affect the right of the parties. If it will not then the application must be dismissed at limine.

[24] The third step will arise if the applicant succeeds in the second step. The third step arises in consequence of case laws under the old regime as well as the new regime. That is to say the applicant must make out a case of 'patent injustice' as a threshold requirement for the court to consider the application on merit under s 42.

A [25] If the applicant makes out a case of patent injustice, then the fourth step is to deal with the merit. In dealing with s 42 on merit, the courts must refrain from acting on the guidelines of case laws from other jurisdiction where our section is not pari materia and/or the procedural methodology is not the same. For example, a number of Malaysian cases has relied on the English case of *Finelvet AG v Vinava*
B *Shipping Co Ltd (The Chrysalis)* [1983] 1 WLR 1469 where Mustill J had given guidelines as to the proper test to determine a 'question of law' arising from arbitration. What is important to note is that the court was not dealing with an equipollent section as that of s 42. In addition, the Arbitration Act which the English court was dealing with was related to the old regime. The old regime allows
C wide parameters to intervene and has nothing to do with party autonomy concept. Even though s 42 is not found in the Model Law 1985, nevertheless the policy of the Model Law as well as AA 2005 is to sustain party autonomy, confidentiality as well as finality of the award concepts which has nothing to do with the old regime. Mustill J approach to show whether the award can be shown to be wrong in law is a three-fold test which necessarily invites to deal with finding of facts. In law it is not
D permissible under s 42 and/or the spirit and/or intent of AA 2005 in challenging the award to deal with finding of facts. If at all the facts had to be garnered, it must be found in the award itself and not in any other extraneous documents and/or affidavits ...

E [27] In my view, a literal interpretation of s 42 of the AA 2005, taking into consideration the policy of Model Law as well as AA 2005, the question of law must arise out of the award. That is to say, the applicant must demonstrate the question of law looking at the award and not any other extraneous material. The court must take the award at its face value. It is a strict test and the section as well as the policy of the Act only requires the court to take a common sense approach. Convoluted
F jurisprudence does not help in a party autonomy concept where confidentiality as well as finality of the award plays a crucial role for the court to decide whether or not it should intervene ...

[29] The fifth step will arise if the threshold as to the merit is satisfied, and if so, the first option to the court is to consider whether it is a fit and proper case to remit the
G award to the arbitrator for reconsideration. This is a safe guard guaranteed in s 42 itself to sustain party autonomy concept where the court takes the view that the arbitrator has fallen into error and/or what often under the previous regime is referred to as a technical misconduct.

[30] The final step must only be to set aside or vary the order.

H

The contentions of parties

[26] The essence of the case of the plaintiff is that the finding made by the learned arbitrator that he is bound by the High Court order of 31 March 2015
I is erroneous. In this regard, the operative word of s 42(4)(c) of the AA and that in the Court of Appeal order is 'reconsideration'. The plaintiff submits that the wording clearly reflects the intention of Parliament and the court in remitting the first award to the arbitrator. Furthermore, this is supported by the fact that the court did not make any further direction nor impose any condition or

restriction in respect of the exercise of the arbitrator's discretion in reconsidering the first award. A

[27] The plaintiff submits that the learned arbitrator is fully entitled to maintain his findings and shall not be bound and constraint to follow the High Court order. The learned arbitrator had thus fallen into an error in arriving at his fresh award when it is palpable from the fresh award that he disagreed with the High Court order. This is especially the case also because the Court of Appeal order had expressly set aside the High Court order. B

C

[28] The plaintiff also referred to the text on *The Arbitration Award, A Practical Approach)* (Ray Turner, 2005, where it is stated therein that an arbitrator having proper regard to the court's determination could still nonetheless maintain his decision 'for good reason'. The following passages (at p 162) were highlighted: D

> ... The new award could have substantially the same content as that which it replaces except that:
>
> (d) the issue(s) affected by the court's determination and remitted by the court would be re-analysed (D) in light of that determination, reaching a new decision; however, if proper regard to the court's determination nonetheless for good reason produced the same decision, that decision would be reiterated ... E

[29] The plaintiff also submits that in taking the position that he is bound by the High Court order, the learned arbitrator did not support his finding with any facts or valid legal proposition. As such, there is a clear error of law on the face of the fresh award which requires intervention from this court. F

[30] There also exists patent injustice, so the plaintiff argues, in respect of the purported misconstruction by the High Court of the background facts pertaining to the insurance claims and of the provisions in cl 36(k) of the COI for 2006. In particular, it was contended that the High Court did not correctly differentiate the terms of cl 36(k)(ii) of the COI for 2006 from cl 36(k)(ii) of the COI for 2008, and erroneously interpreted the amended cl 36(k)(iii) of the COI for 2008 as being part of the COI for 2006 in respect of the true meaning of the definition of 'one claim' under the COI for 2006. In essence, the definition of 'one claim' as relied by the defendants in repudiating liability, and accepted by the High Court, is not found in the COI for 2006 of the PII scheme. The plaintiff thus submits that the High Court order gave rise to a patent injustice which caused great prejudice to the plaintiff. G H I

[31] The plaintiff maintains that even if the alleged perpetrator in common is the plaintiff's former employee, and that the modus operandi of the crime is similar, the fact was the fraud was committed on different parties and it is not

related to one another apart from the claims filed by two identified parties. It was the finding of the adjusters appointed by the defendants who testified in the arbitration proceedings that the scheme was executed by a group of persons with Mr Manoharan being the prime suspect.

[32] The defendants in their resistance of this application raised, in summary, the following key challenges:

(a) the plaintiff failed to show a valid question of law arising out of an award to set aside the fresh award;

(b) the plaintiff in any event failed to demonstrate any error of law of patent injustice;

(c) the arbitrator is bound by the High Court's answer in relation to the construction of cl 36(k)(ii) of COI 2006 when reconsidering the first award; and

(d) the plaintiff should be prevented from re-litigating the same issues concerning the interpretation of cl 36(k) of COI 2006.

EVALUATION AND FINDINGS OF THIS COURT

[33] I shall next examine what I consider to be the key issues relevant to this application and in the process where pertinent refer to the arguments of the parties.

Whether an arbitrator is under the law bound by the determination made by the High Court

[34] As stated above, the plaintiff takes the position that an arbitral tribunal is not bound by the determination made by the High Court in respect of the question of law that was referred to the High Court under s 42 of the AA. The plaintiff also cited the decision of Saskatchewan Court of Appeal of Canada in *Farm Credit Canada v National Bank of Canada* [2011] SJ No 676 where it was held that the end result of an arbitration process has not been pre-ordained in situations where the arbitrator is directed to reconsider his award.

[35] In my view, the argument that the arbitrator is fully entitled to maintain its earlier decision and not be bound by the determination of the High Court because there is no direction impliedly or expressly made by the Court of Appeal for the arbitrator, in his reconsideration to follow the answer given by the High Court order, is unmeritorious.

[36] The plaintiff's submission that s 42(4)(c) of the AA would be rendered meaningless if the arbitrator is bound by the finding of the court particularly

when the order remitting the case is unconditional, is misconceived. There is nothing inherently repugnant to the notion that an arbitrator must follow the determination of the question of law made by the High Court. Otherwise why have this statutory right in the first place. A contrary stance, as that taken by the plaintiff would instead render the reference mechanism of little legislative utility. And there is nothing in s 42 which even remotely suggests that somehow the status of such determination, especially its binding nature, is in any manner affected by whether or not there are specific conditions or directions attached to the remission order.

[37] It is no less erroneous for the plaintiff to speak of the jurisdiction of the arbitrator to reconsider the question remitted by the court under s 42(4)(c) of the Act 'to be a fallacy or a futile exercise if the arbitrator does not retain the discretion to disagree with finding of the Court especially if the Court had misplaced the finding'. The simple riposte to this assertion, itself misplaced, is that if the determination by the High Court is wrong in law, it is not for the arbitral tribunal to trouble itself to make the redress. Such erroneous determination by the High Court should properly be made the subject of an appeal, as what precisely happened in the instant case in respect of the question of law in the first award.

[38] A careful review of the plainly drafted s 42(4)(c) of the AA would readily reveal two different subject matters. The first is the award, the other is the question of law being the subject of the reference. There is a clear distinction between the two items which must surely be easily fathomable. The question arises out of the award. That much is made absolutely clear in s 42(1). The same subject, namely the question of law, is the one being referred to the High Court for determination. The High Court thus determines the answer to the question of law posed to it. Upon making the determination however, unless the High Court decides to invoke its powers to either affirm, vary or set aside the award under s 42(4)(a), (4)(b) or (4)(d), respectively, the award is remitted for reconsideration by the arbitrator under s 42(4)(c), as presently. In such event, the High Court does not need to determine the award. That remains firmly vested in the jurisdictional powers of the arbitral tribunal.

[39] It is worthy of emphasis that as a corollary, what is then required to be reconsidered by the arbitrator is the award, and not the question of law. Again, I emphasise that the award and the question of law arising from the former are distinct. The arbitrator must thus embark on a process to reconsider the award, but this exercise does not and cannot involve any discretion on the part of the arbitral tribunal to decide on whether or not to follow the determination on the question of law already made by the High Court.

[40] It is of course a given that the determination of the question of law has considerable and crucial implication on the status of the award. In many cases, on remission, the reconsidered awards get decided the way they were, in consonant with, if not as a result of the determination made on the question of law. But such a consequence is not automatic, and every case is ultimately dependent on the facts and circumstances of the awards.

[41] It is thus entirely an unsustainable argument to maintain, as what the plaintiff in effect tries to do, that an arbitrator can decide not to follow the determination on the question of law by the High Court in answer to a question of law referred to it. This would be a flagrant repudiation of the legislative scheme of s 42 which stipulates that a question of law arising from an arbitral award is to be answered by the High Court.

[42] There is no legitimate basis to contend that s 42(4)(c) is rendered meaningless if the distinction between the award and the question is firmly recognised, for following the remission order, the arbitrator will have to proceed to apply the High Court's determination of the question of law to the facts of the case in the arbitral award. It bears repetition that this is absolutely crucial because it does not mean that the determination of the question of law (and it cannot be emphasised enough that it can only relate to a question of law) will without more seal and automatically decide the case. For the arbitral tribunal must then apply such determination to the fact, circumstances as presented as evidence in the proceedings which produced the award.

[43] If the issue before the arbitral tribunal is for all intents and purposes a pure question of law which is then referred to the High Court under s 42, arguably the determination by the High Court would effectively resolve the dispute in arbitration on the basis of that very determination. But clearly such determination does not necessarily pre-ordain the results of the arbitration in each and every case.

[44] Thus even if in the instant case, the very question of law having been referred to the High Court in respect of the first award is the only issue of contention, which determination could have the effect of necessarily disposing of the matter one way or the other, this still does not, considering the distinction between the first award and the question of law that arose therefrom, justify the stance taken by the plaintiff that the arbitrator is not bound to follow the determination of the High Court Order. As a matter of the proper construction of s 42(4) of the AA, he manifestly is.

[45] Furthermore, the Canadian case of *Farm Credit Canada v National Bank of Canada* [2011] SJ No 676 referred to by the plaintiff does little to advance the case of the plaintiff that an arbitrator is not bound by the

determination of the question of law made by High Court. The appellant's main contention in *Farm Credit Canada,* as correctly highlighted by the defendants, is that the judge should only remit the answer to the question of law referred to it, and not other further comments, to the arbitrator for reconsideration. This is quite different from the situation in the instant case where the plaintiff is arguing that the arbitrator is not bound by the High Court's answer to the question of law referred to it pursuant to a remission order made under s 42(4)(c) of the AA.

[46] Nor is the plaintiff's reliance on the relevant provisions for remission enacted in the UK and Singapore sustainable. As highlighted by the plaintiff themselves, these provisions are different from s 42(4) of the AA. This is because the language of s 69(7)(c) of the UK Arbitration Act 1996 and that of s 49(8)(c) of the Singapore Arbitration Act 2001, provide for the authority of the court to remit the award to the arbitral tribunal for reconsideration in the light of the court's determination. In any event even if this language suggests from the presence of the words 'in the light of' that following the determination of the court reliance on it by the arbitrator is somehow less than mandatory, it still does not categorically prescribe the superiority of one interpretation over any other.

[47] For it is in truth unnecessary when it is clear as daylight that in the context of the law providing for the reference of question of law arising from an arbitral award, the basic underlying premise, despite the slight differences in drafting and nuances vis a vis the equivalent legislation in other jurisdictions, is that given the determination made by the court, the arbitral tribunal must perform another evaluation and consideration of the case, and in the discharge of such exercise must apply the determination already made by the court on the question of law, in arriving at the final and fresh award.

[48] It is also fairly settled that by virtue of the remission order, the jurisdictional authority of an arbitrator is resurrected to do only one function, that is to reconsider and decide on the matter of the first award, specifically in respect of the interpretation of cl 36(k) of the COI for 2006, and to apply the determination of the High Court on the question of law referred to it.

[49] The following passage from the textbook *Arbitration Awards: A Practical Approach* (Ray Turner, 2005) referred to by the defendants, which discusses the effect of a remission order under ss 69(7)(c) and 71(3) of the UK Arbitration Act 1996 which are similar to the language of ss 42(4)(c), (5) and (6) of the AA, is of relevance:

> Awards following remission (see ss 68(3)(a) and 69(7)(c))
>
> ...

A One of the avenues open to the court is to remit the award, or part of it, to the arbitrator for reconsideration. Under Section 69, that reconsideration is to be 'in the light of the court's determination', ie giving proper regard to the decision of the court on the point or points of law referred to it.

On such remission, the arbitrator must reconsider the matter (s) remitted. If under
B Section 68, he must correct it so as to remove the effect of the relevant and identified 'serious irregularity'. If under Section 69, he must make such amendment as is generated by the Court's determination on the point of law. In either event he must, by Section 71(3), make a fresh award on the remitted matters and must do so within the time laid down.

C

[50] There is thus a principle that the arbitrator is only conferred with jurisdiction to reconsider matters remitted to him under a remission order. In the literature entitled *The Law and Practice of Commercial Arbitration in England* (Mustill and Boyd — 2nd Ed, 1989), it was stated thus:

D The courts have worked out the effect of a remission rather more fully. It appears that where the order embraces all the matters referred, the arbitrator resumes all his authority over the dispute, and the original award completely falls away. When the remission applies only to some of the matters referred, the arbitrator no longer has power to vary his award in respect of those matters which the Court has left
E untouched. He must, as a matter of form, make a fresh award covering the whole of the matters originally submitted to him; but as regards those not remitted he must simply repeat this original decision. Until this new award is published, there is no binding adjudication on any of the matters referred ...

F **[51]** Thus it is imperative that the words as expressed in the court order directing the remission be adhered to in order to ensure that the jurisdiction of the arbitrator in performing the reconsideration is clearly defined and not overstepped. Thus in *Interbulk Ltd v Aiden Shipping Co Ltd, The Vimeira (No 1A)* [1985] 2 Lloyd's Report 410, in ruling that the arbitrators have no
G jurisdiction to entertain new issues following the remission, the English Court of Appeal also held as follows:

the court can, and frequently does, restrict the reconsideration of the tribunal to a particular aspect of a matter referred ... the extent to which it is revived will depend upon the order of the Court.

H It is necessary, therefore to have regard to the order of the Court in order to ascertain the extent to which, upon the remission, the jurisdiction of the arbitrators has been revived. In the present case, the order refers back to the judgment of the Court; ... we consider that it is clear from the judgment read as a whole ... To that extent, and to that extent only, was their jurisdiction revived ...

I

[52] However, in the instant case, the Court of Appeal order does not contain any specific direction or condition that would have the effect limiting the reconsideration by the learned arbitrator to only certain aspects of the first award. Instead it is clear that in the absence of any such limitation, the entirety

of the first award must be reconsidered, taking into account the imperative of following the determination of the question of law.

[53] Accordingly, in my judgment, an arbitral tribunal must rightly be bound by the determination made by the High Court under s 42(4)(c) of the AA. This however does not yet answer the first question of law posed to this court by the plaintiff herein. This, I will consider next.

Whether the arbitrator in this instant case is bound by the determination by the High Court in OS 26

[54] However, notwithstanding my finding on the binding nature of the determination of the question of law by the High Court in the reconsideration of the award by an arbitrator following a remission under s 42(4)(c), I observe that there appears to be some dispute as to whether the position so taken by the learned arbitrator *in the instant case* in following the determination made in the High Court Order in OS 26 was regular and justified under the law.

[55] The defendants argued, somewhat cryptically, that the Court of Appeal had in para (ii) of the Court of Appeal order only set aside the High Court order which in turn specifically stated the decision to set aside the first award in para 2 of the High Court order. The Court of Appeal did not, so the defendants contend, overturn the High Court's determination on the question of law as stated in para 1 of the High Court order. By expressly remitting the case 'to the arbitral tribunal for reconsideration pursuant to s 42(4)(c) of the Arbitration Act 2005' the Court of Appeal had thus intended for the first award to be reconsidered by the learned arbitrator together with the determination on the question of law in the High Court order.

[56] But I do not quite agree how this interpretation of the Court of Appeal order by the defendants could be correct. It is anything but correct. It is also untenable and represents an irreconcilable contradiction. As the defendants were specific in their reference to the terms of the Court of Appeal order, I propose the same be reproduced to ascertain if their assertions are of any substance.

[57] In para (i) of the Court of Appeal order (the entirety of which was set out earlier) which is the central plank of the appeal decision, it is stated in clear and unambiguous terms that:

(i) Appeal is allowed with costs of RM15,000.00;

[58] I cannot, in this present context, envisage any formulation of an appellate judicial pronouncement more clearly stated that this. The defendants

however seem contented in curiously not making any clear mention of this decision set out in para (i) of the Court of Appeal order.

[59] Neither can it be validly said that the decision of the Court of Appeal in allowing the appeal is not in respect of the first award. Because it was precisely against the decision of the High Court in its determination of the question of law posed to it in the reference proceeding. For it is on record that by its notice of appeal dated 2 April 2015, the plaintiff appealed against *the entire decision* of the High Court dated 31 March 2015 which had determined the question of law referred to the High Court by the defendants vide the defendant's action No 24NCC(ARB)-26–05 of 2014 in favour of the defendants and consequently set aside the first award of the arbitrator.

[60] Paragraph (ii) of the Court of Appeal order states that:

> (ii) The decision of the High Court dated 31 March 2015 setting aside the Partial Award with costs of RM20,000.00 is set aside;

[61] I do not think that it is convincing to argue, as the defendants did, that the above para (ii) evidences that the Court of Appeal only set aside para 2 of the High Court Order which in turn set aside the first award, and did not touch on the answer to the question of law referred to it, as stated in para 1 of the High Court order. There is absolutely no basis to suggest that the Court of Appeal order was making reference to specific paragraphs of the High Court order when the Court of Appeal could have so specified the paragraphs in question, but did not in fact do so. And the reason why it did not is so manifestly that the Court of Appeal did not have to do so since the Court of Appeal has allowed the appeal and set aside the entire decision of the High Court as embodied in the High Court order.

[62] Neither does para (iii) of the Court of Appeal order actually express the remission of the first award to be on the basis of 'together with the determination on the question of law in the High Court order'. It states:

> (iii) This case is to be remitted to the arbitral tribunal for reconsideration pursuant to s 42(4)(c) of the Arbitration Act 2005 ('the Act').

[63] There is absolutely nothing in that para (iii) which states that the determination in *the High Court order in OS 26* must accompany the reconsideration of the first award upon remission under s 42(2)(c) (but see further on this point later).

[64] It is a patent misconception on the part of the defendants to suggest that the Court of Appeal did not set aside the decision of the High Court on the determination of the question of law, but merely set aside the decision of the

High Court to set aside the first award. If nothing else, this is because common sense and pure logic would dictate that the setting aside of the latter by the High Court must have necessarily resulted from the determination on the question of law by the High Court that did not support the first award (which thus led to the first award to be set aside by the High Court).

[65] It is trite and settled law that an order or judgment is valid and must be obeyed unless it is set aside or varied. Therefore, if it is set aside, the said order becomes unenforceable or is not binding on parties (see *Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217; [1993] 3 CLJ 210). Thus, the defendants' contention that the Court of Appeal affirmed the High Court order on the determination of the question of law in OS 26 is entirely bereft of any semblance of merit and bordering on being disingenuous at the same time.

[66] Thus, whilst the plaintiff's position that the High Court Order of OS 26 had been set aside and ceased to be enforceable is correct, I do think it is right for them to argue that in reconsidering the first award, the learned arbitrator is not under s 42 of the AA bound by the findings or determination made by the High Court on the question of law that was referred to the High Court. And I say so because of the reason that I have stated earlier that in the instant case, the learned arbitrator is not so bound only because the High Court order containing the determination had been set aside by the Court of Appeal, and not because, as argued by the plaintiff, of any legal principle that a determination on a question of law is not binding on an arbitrator following a remission order under s 42 of the AA.

[67] Thus, it is my judgment that for present purposes, the plaintiff's contentions in the reference under s 42 presently before me that the High Court order in OS 26 had misconstrued the background facts by finding that the claims filed against the plaintiff were all related to the embezzlement or fraud committed by Mr Manoharan, or that the High Court had made a wrong finding in the determination of the question of law on the construction of cl 36(k) of the CO1 of 2006 are therefore of no relevance. The High Court order, which contains such determination has been set aside and thus cannot feature in the reconsideration of the first award by the learned arbitrator following remission of the first award by the Court of Appeal under s 42(4)(c) of the AA.

[68] As such, my answer to the specific question posed by the plaintiff in its originating summons is in the negative. The learned arbitrator is not bound to follow the High Court order because it has been set aside. The fresh award is thus inflicted by an error of law on the face of the award. Thus my determination of the first question of law in response to the exact reference

posed by the plaintiff would be as follows:

> In reconsidering the *Partial Award (On Liability)* made and published by Belden Premaraj, the arbitrator on 8 April 2014 pursuant to the Order of the Court dated 25 November 2015 in Civil Appeal No W-02 (NCC)(A)-575-04/2015 and in accordance with Section 42(4)(c) of the Arbitration Act 2005, the arbitrator is NOT bound by or constrained to follow the Judgment ('the Decision') of the High Court dated 27 May 2015 in respect of the Order dated 31 March 2015 delivered by the High Court of Malaya at Kuala Lumpur in Originating Summons No 24NCC-(ARB)-26-05/2014 because the Decision was set aside by the Court of Appeal.

What is the determination of a question of law that must be followed in the reconsideration of the first award?

[69] The issue to be addressed next is the crucial question as to how adherence can be made to s 42(4)(c) of the AA, specifically in reconsidering the first award in the absence of any valid determination of the question of law referred to the High Court, given the setting aside of the High Court order by the Court of Appeal in the instant case.

[70] Section 42(4)(c) of the AA mentions only provisions for the reference of the questions of law being made to the High Court, and for the High Court similarly having the authority to remit the award on the determination of a reference. It does not expressly extend to a situation where the determination of the question of law is subject to appellate intervention.

[71] Although parties did not provide sufficient clarification on this point, in my view the Court of Appeal order must be construed as a decision where the Court of Appeal allowed the appeal against the High Court order, set it aside and reversed the same, in the sense that the Court of Appeal having heard the submissions of parties in the appeal, disagreed with the High Court order in its determination of the very same question of law and the position taken by the defendants; and thus accepted the stance of the plaintiff (which is also the finding in the first award) as the correct interpretation of one claim in COI for 2006 under the PII scheme.

[72] After all, the question of law posed to the High Court in OS 26 was one that required the answer to be given in the positive or in the negative. The learned arbitrator decided in the negative, High Court order determined in the affirmative, and on appeal the Court of Appeal allowed the appeal and set aside the determination by the High Court. The Court of Appeal thus determines that the answer should rightfully be in the negative.

[73] In my view, this construction, which does not in any fashion interfere with the party autonomy concept, is fully consistent with the Court of Appeal order which has also in para (iii) itself ordered the remission directly to the learned arbitrator. If one were to, in my view erroneously, insist on a 'strict' reading of s 42(2)(c), then only the High Court, as stated therein, could make such remission, after the same High Court had made the determination on the question of law referred to it.

[74] In the instant case, the Court of Appeal had in the exercise of its appellate powers set aside such determination by the High Court, and significantly, ordered the remission of the first award directly back to the learned arbitrator under the provision of s 42(4)(c). In essence, the language of s 42(4)(c) admits of a situation where, should the Court of Appeal set aside or reverse such a determination, the Court of Appeal may under its appellate powers substitute its decision for the determination of the High Court, order the remission of the award, 'together with the High Court's determination, on the question of law (to be read to be qualified by any appellate intervention, as may be set aside and reversed by the Court of Appeal) to the arbitral tribunal for reconsideration'.

[75] Accordingly, in the event appellate intervention on the question of law determined by the High Court results in the situation such as presently encountered by the parties in the instant case, the reference in the legislative scheme of s 42(4)(c) of the AA to the High Court as the court making the determination on the question of law and as the court making the remission of the award back to the arbitral tribunal must necessarily be construed to mean and refer to the Court of Appeal. The Court of Appeal made the remission as is the case presently, and the Court of Appeal must also be construed to have made the determination on the question of law to accompany the remission. The learned arbitrator should have therefore applied the determination of the question of law as reversed by the Court of Appeal in arriving at the fresh award.

OTHER CONSIDERATIONS

[76] For completeness, I should also discuss other relevant considerations. Thus, the application to set aside the fresh award under s 42 of the AA must show that the question referred to the High Court is a proper and valid question of law arising out of the award (see for example the Court of Appeal decision in *SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd* [2014] 2 MLJ 627).

[77] It bears repeating that the plaintiff in summary is seeking to refer to this court, in essence, the following three key questions:

A (a) whether the High Court's answer in OS 26 is binding on the arbitrator when reconsidering the first award under the remission order made by the Court of Appeal;

(b) whether the High Court had correctly construed the definition of 'one claim' under cl 36(k) of the COI for 2006; and

B

(c) whether the fresh award is tenable in view of the other findings made by the arbitrator on the construction of the definition of 'one claim' under cl 36(k) of the COI 2006.

C

[78] I do not doubt that first question referred to this court — whether the High Court order in OS 26 which answered the question of law is binding on learned arbitrator is a proper and valid question of law arising out the fresh award (as opposed to arise out of the arbitration) since it manifestly challenges whether it was correct for the learned arbitrator to have taken the view that he was bound by the High Court order in arriving at the fresh award despite the learned arbitrator openly in the fresh award disagreeing with the determination of the question of law on the true interpretation of one claim in the PII scheme as set out in the High Court order.

D

E

[79] At the same time I have no hesitation in finding that such question substantially affects the rights of one or more of the parties in accordance with s 42(1A) of the AA for it has direct relevance to the overarching issue concerning the plaintiff's claim against the defendants arising from the repudiation of liability under the PII scheme. I have already provided the answer to this question of law in the negative. I reiterate that this is not because under s 42(4) such determination by the High Court is not binding. Instead this is by reason of the fact that in the instant case, the High Court order that the learned arbitrator thought he was compelled to accept in his reconsideration of the first award, was no longer valid after it was set aside by the Court of Appeal, before such reconsideration by the learned arbitrator.

F

G

[80] In respect of the proposed questions of law in paras 2–3 however, in my assessment, these are not exactly questions of law, and have in any event been determined by the High Court in OS 26, and subsequently by the Court of Appeal in setting it aside. I am of the view that this, for all intents and purposes constitutes an attempt on the part of the plaintiff to re-litigate the determination of the answer to the question of law referred to the High Court on the principal and core issue of the definition of one claim under cl 36(k) of the COI for 2006 when the same had been adjudicated and determined by the High Court and by the Court of Appeal. As such these proposed questions cannot be validly said to be arising from the fresh award.

H

I

[81] It is worthy of emphasis that the defendants and the plaintiff chose not to appeal against the Court of Appeal order which remitted the case directly back to the learned arbitrator to be reconsidered with the High Court order as reversed by the Court of Appeal. This court cannot therefore countenance resort to a s 42(1) application when for all intents and purposes, it is in truth an attempt by the applicant to appeal against an arbitrator's decision.

[82] On this, I must refer to the decision of the Court of Appeal in *Awangku Dewa bin Pgn Momin & Ors v Superintendent of Lands and Surveys, Limbang Division* [2015] 3 MLJ 161 which had usefully set out the following guidance for the High Court when dealing with a s 42 reference:

> GUIDANCE FOR THE HIGH COURTS
>
> [27] We wish to take the opportunity here to provide the following guidance for the benefit of the High Court judges in dealing with a s 42 reference. A High Court in considering a s 42 reference must not take lightly the duty to critically examine the questions posed by the applicant and to ensure that the question referred to the court is purely a question of law and not a question of mixed law and fact, and is clearly and concisely framed, before embarking to entertain the application and to answer the question posed. There should be no complication, confusion or duplicity in framing the questions. Instead, there should be simplicity and clarity. The legal burden is on the applicant to ensure that these requirements are strictly complied with.
>
> [28] A High Court in dealing with a s 42 reference must summarily dismiss the application, without even attempting to answer the 'question of law' posed to the court, if the question is, in the first place, not properly and intelligibly framed; or where it is clear to the court that there is a disguised attempt by the applicant to appeal against the decision of the arbitral tribunal. In other words, a court of law must always be vigilant against any attempt by a party to abuse the s 42 procedure as provided for by the Act and to utilise the provision as a backdoor avenue for appealing against the decision of an arbitral tribunal.
>
> [29] Perhaps, to put what we have just said in another way, the High Court must ensure that the question posed by the applicant to the court is a proper and valid question. As the Court of Appeal said in *SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd* [2014] 2 MLJ 627 at p 633; [2014] 3 CLJ 632 at p 639, paras 9–12):
>
> > [9] In my judgment, for a proper invocation of s 42(1) of the Arbitration Act 2005, the question referred to the High Court must be a proper and valid question.
> >
> > [10] For the purpose of this judgment, I need only to focus on the first proposed question, since the second proposed question is consequential in nature.
> >
> > [11] In my view, in the present case, this particular 'question of law' referred to the High Court purportedly pursuant to s 42 is not a proper and valid question of law.
> >
> > [12] But how does one determine whether a particular question raised is a proper

A and valid question of law or not? In my judgment, one does so by considering the propriety of the question that is proposed in the context of the facts of the case as a whole, including the issues that have to be dealt with by the arbitrator.

B **[83]** It is well established that even if the question referred to this court is a question of law, the applicant must still show an error of law of 'patent injustice'. This was clearly reiterated by the Court of Appeal recently in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697; [2016] 3 CLJ 403. It has also held that the court should be slow in interfering with an C arbitral award unless there is blatant injustice. The following passages from the judgment of Ramly Ali JCA (as he then was) in *Ajwa For Food Industries Co (Migop), Egypt v Pacific Inter-Link Sdn Bhd & another appeal* [2011] MLJU 1537; [2013] 2 CLJ 395, is most instructive:

D [13] ... The effect of the present ss 8, 9, 37 and 42 of the Arbitration Act 2005 is that the court should be slow in interfering with an arbitral award. The court should be restrained from interference unless it is a case of patent injustice which the law permits in clear terms to intervene. Once parties have agreed to arbitration they must be prepared to be bound by the decision of the arbitrator and refrain from approaching the court to set it aside. Constant interference of the court as was the E case in the past will defeat the spirit of the Arbitration Act 2005 which is for all intent and purpose to promote one-stop adjudication in line with the international practice (see: *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83; and *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43).

F [14] The Federal Court has laid down a well-settled principle in the case *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401; [2004] 1 CLJ 743, that an arbitration award is final, binding and conclusive; and can only be challenged in exceptional circumstances. Siti Norma FCJ in that case stated:

G The law regarding the effect of arbitration's award is well settled in that the award is final, binding and conclusive and can only be challenged in exceptional circumstances. As such if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him be it oral or documentary that in itself is not sufficient for the setting aside of his award.

H **[84]** I am satisfied that having considered the long line of authorities on the point of patent injustice, in respect of the first question of law, I find that the facts of the instant case, which include probably a novel question on the binding status of the determination by the High Court on a question of law I referred to it, but which was then subsequently set aside and reversed by the Court of Appeal, more than amply demonstrate the quality of being tantamount to exceptional circumstances to justify intervention to prevent gross injustice to the parties to the proceedings.

[85] I have no doubt that the instant case does not involve the contention that the learned arbitrator has drawn wrong inferences of fact from the evidence or that he had has mistakenly applied the facts to the answer given by High Court on the plaintiff's question of law, for even if that were the case, this would not be subject to a review by the courts under s 42 of the AA. And in any event it is not the function of the court to examine the correctness of the award on merits (see the Court of Appeal decision of *Far East Holdings Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang and another appeal* [2015] 4 MLJ 766; [2015] 8 CLJ 58).

[86] Furthermore, the second proposed question of law is clearly unnecessary since it would involve a re-examination of the issues already determined, and potentially res judicata at the same time. The third proposed question of law is also unnecessary since I have already answered question one in the negative for a different reason and as its determination would also like for the proposed second question, involve a re-examination of the issues already adjudicated on. Accordingly, I remit the fresh award given the error of law on the face of the fresh award in respect of the learned arbitrator's reliance on the High Court order, for a fresh reconsideration under s 42(4)(c) with the question of law determined by the High Court order, as reversed by the Court of Appeal order. I do not consider it appropriate for this court to confirm or vary the fresh award given the error of law, nor have it set aside in view of the Court of Appeal order which ought to be strictly and properly adhered to by the arbitral tribunal. I do not think it is a proper exercise of the court's jurisdiction to have the fresh award set aside and not have it correctly adjudicated on. Nor do I deem it defensible for me to have it set aside, and was prayed for by the plaintiff, re-examine the issues concerning the true interpretation of 'one claim'. The remission would allow the award to be reconsidered at the right forum, which is the arbitral tribunal.

CONCLUSION

[87] In view of the foregoing reasons I allow the plaintiff's application but on terms as I have described, principally in pursuance of s 42(4)(c) of the AA, with costs.

Fresh award remitted for fresh reconsideration under s 42(4)(c) of the Act with question of law determined by High Court order, as reversed by Court of Appeal order.

Reported by Dzulqarnain Ab Fatar